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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 774

WORLD AIRWAYS, INC.,
PETITIONER,

v.

NORTHEAST AIRLINES, INC.,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Northeast Airlines, Inc. respondent herein, respectfully submits the following in opposition to the Petition for a Writ of Certiorari filed November 26, 1965:

Question Presented

The sole question presented by the petition herein is whether the District Court properly exercised its jurisdiction under section 1007(a) of the Federal Aviation Act of 1959 ("the Act"), 49 U.S.C. § 1487(a), to enjoin illegal

air transportation instead of remitting the matter to the Civil Aeronautics Board ("the Board"), where the substantive issue was a matter of interpretation within the conventional experience of courts, the Board had supported the exercise of jurisdiction, and the court had the benefit of a decision in the matter of the Board's agency charged, by delegation of authority, with responsibility for enforcing the provisions of the Act?

Statement

At the outset of the winter of 1964-65, Northeast Airlines, one of three airlines authorized to provide air transportation in the so-called East Coast-Florida air travel market, was faced with the prospect of substantial competition for the highly seasonal air travel business to Florida from not only Eastern Air Lines and National Airlines, the two other scheduled air carriers, but also from petitioner and other supplemental air carriers authorized to provide only so-called charter service. Petitioner alone had scheduled twelve flights every weekend during the season as compared with sixteen such flights by Northeast.[1]

After investigation Northeast became convinced that petitioner's flights were not authorized by, and were in violation of, the terms of its certificate, in which the key term "charter trips" is defined as

> "air transportation . . . where the entire capacity, of one or more aircraft has been engaged on a time, mileage, or trip basis: . . . By a person (no part of

[1] R. 387-388; Official Airline Guide, December, 1964. The Petition for a Writ of Certiorari and the Appendices thereto are cited herein, respectively, as Pet. and Pet. App. Certain materials which are not reproduced in any appendix to the Petition are cited herein by reference to the printed Record ("R.") which was before the court below and is part of the certified record filed in this Court.

whose business is the formation of groups . . . for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons and/or their property, as agent or representative of such group . . . ." (R. 259).

In view of Northeast's dire financial situation and the need, in order to obtain permanent certification to Florida, to convince the Board that the market was large enough to require its services on a permanent basis—a position the Board had previously rejected[2] — it became imperative that these violations be curbed promptly. Inasmuch as the Board has no power to grant preliminary relief, the only possible way of doing so was by commencing an action in the District Court under section 1007(a) of the Act, which Northeast did on December 11, 1964. The complaint prayed, *inter alia*, for preliminary and permanent injunctions restraining petitioner from performing certain charter flights which were alleged to be in violation of petitioner's certificate. (R. 12-17).

Prior to the date Northeast instituted this action, the Board's Bureau of Enforcement, to which the Board has delegated the responsibility for enforcing the provisions of the Act,[3] conducted its own investigation of the charter arrangements of petitioner and other supplemental air carriers, and by letter dated December 11, 1964,— the date the present action was commenced — John G. Adams,

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[2] The full story of Northeast's efforts to obtain permanent certification from the Board in the East Coast-Florida market is set forth in *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 331 F.2d 579 (1st Cir. 1964); *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 484 (1st Cir. 1965); *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 488 (1st Cir. 1965), *cert. denied sub nom. Eastern Air Lines, Inc.* v. *Northeast Airlines, Inc.*, 15 L. Ed. 2d 85 (1965).

[3] Public Notice PN-15—Statement of Organization and Delegations of Final Authority, 26 Fed. Reg. 7231 (Aug. 10, 1961).

then Director of the Bureau of Enforcement and now a member of the Board, advised petitioner and other supplemental carriers that certain practices of which Northeast had complained were in violation of their certificates, including arrangements by which a travel agent gives to the carrier express or implied guarantees as to the amount of revenue to be realized by the carrier from a charter trip. (R. 34-41).

Thereafter, on December 19, 1964, Northeast filed a motion for a preliminary injunction, and on December 21, 1964, the District Court indicated it would grant the injunction requested. (R. 295). The Civil Aeronautics Board then filed a memorandum in the District Court in which it endorsed and supported Northeast's motion for preliminary injunction and restated its view of long standing that the doctrine of primary jurisdiction was inapplicable and that action by the court would not impair the exercise of the Board's statutory powers. (R. 295-297). Thereafter the court on December 24, 1964, issued the preliminary injunction. (R. 298-301).

On January 26, 1965, Northeast filed a motion for summary judgment based solely upon a so-called "Sales Agency Agreement" between petitioner and Nationwide Charters and Conventions, Inc. ("Nationwide"), a travel agent. (R. 306).

The so-called "Sales Agency Agreement" (R. 371-388) between petitioner and Nationwide was entered into on August 13, 1964. By the agreement petitioner committed aircraft to Nationwide, and Nationwide undertook to sell some 262 charter flights, of which 218 flights were not cancellable. For each non-cancellable flight which Nationwide was unable to sell to a qualified charter group, Nationwide was obliged to pay petitioner as liquidated damages a fixed amount which equalled petitioner's tariff rate less agency commission. Nationwide also agreed to deposit

$50,000 to secure performance by it and to secure the payment of sums due for each charter trip.

After hearing, Northeast's motion for summary judgment was allowed on March 12, 1965. (R. 424-428). On March 16, 1965, the District Court entered the judgment for a permanent injunction substantially similar in its terms to the preliminary injunction. In so doing, the District Court found that flights under the agreement violated petitioner's certificate, that the court had jurisdiction of the cause by virtue of 49 U.S.C. § 1487(a), and that further resort to the Board was not required.

The Court of Appeals for the First Circuit affirmed the judgment insofar as it enjoined the operation of flights between Boston/New York/Washington/Philadelphia and Florida pursuant to the "Sales Agency Agreement". The Court of Appeals also held that the District Court had jurisdiction under 49 U.S.C. § 1487(a), and that further resort to the Board was not required.

Argument

The present petition does not present any question of general importance warranting the attention of this Court. In the first place, the real issue raised by petitioner's arguments is the very limited question whether administrative expertise was required to resolve the narrow substantive issue raised by this particular case—the issue whether, in law, under the Sales Agency Agreement Nationwide was the party which had "engaged" the aircraft of petitioner. Second, this case does not involve the usual general problem of primary jurisdiction, which is concerned with accommodating the general jurisdiction of courts with jurisdiction of regulatory agencies, but involves the much narrower issue of the exercise of jurisdiction by a court under a special limited jurisdictional statute, 49

U.S.C. § 1487(a), which is itself part of the regulatory scheme. Third, few cases have arisen under 49 U.S.C. § 1487(a) and its predecessor section of the Civil Aeronautics Act of 1938, and the issue of primary jurisdiction under this statute has thus been of no moment. Fourth, the decision in this case rests on the circumstances peculiar to this case that the substantive issue was a matter of documentary interpretation within the conventional experience of courts and that the Board had supported the exercise of jurisdiction by the court, and the court had the benefit of a decision on the substantive question by the Board's Bureau of Enforcement. Fifth, the decision by the courts below to exercise jurisdiction was required by the language and purpose of section 1007(a) and was in accordance with well-established principles permitting judicial decision without prior resort to the agency when the issue involved is violation of a rule rather than the reasonableness of a rule. Finally, the underlying dispute regarding the charter program under the "Sales Agency Agreement" is of no continuing practical significance because the agreement expired by its terms more than seven months ago and the Board has since prohibited the mass media advertising on which the effectiveness of such a charter program depends.

I. The Petition Raises No Significant Question of General Importance.

The petition manifestly raises no question of general importance warranting the attention of this Court, but raises only the narrow issue whether the court below should have applied primary jurisdiction to the unique facts of this case. Petitioner's principal argument for review by this Court is that prior resort to agency expertise was required in this case because the record showed

various actions by the Board indicating "concern" with certain aspects (not related to the issue in this case) of the definition of "charter trip" and because "a determination of the true significance" of a particular provision of petitioner's contract with Nationwide required "specialized knowledge" (Pet. 6-8). Petitioner itself points out that the court below felt that further agency expertise was not required because "the analysis, interpretation, construction and application of contracts are within judicial competence . . . , *at least in the case before us* . . . ." [Emphasis added]. (Pet. 4). The narrowness of the issue and its dependence upon the unique facts here could hardly be plainer, and the case comes down to a difference between the Board and the courts below on the one hand, and petitioner on the other, as to whether administrative expertise was required.

Furthermore, the petition does not raise the usual general question of primary jurisdiction but only a question of application to the special facts of this case of section 1007(a) of the Federal Aviation Act, 49 U.S.C. § 1487(a), a special section conferring on the district courts jurisdiction which is an integral part of the regulatory scheme. Section 1007(a) of the Federal Aviation Act specifically confers upon the federal district courts jurisdiction to enforce, among other things, compliance with section 401(a) of the Act, 49 U.S.C. § 1371(a), at the behest of either the Board or "any party in interest", which Northeast concededly is. The purpose of this provision is, as the Board pointed out in its memorandum to the district court, "to afford methods of enforcement *in addition to those provided by the Board* and in recognition of the fact that the Board's resources may not be adequate." [Emphasis added.] (R. 296) The standard primary jurisdiction case, such as *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956) or *United States* v. *Chesapeake and Ohio Ry. Co.*, 352 U.S. 77

(1956), involves consideration of the competence of a court under its grant of general jurisdiction to handle a common-law claim which is outside the regulatory framework but which involves a regulatory issue which is within the sphere of expertise of the administrative agency. This case involves the question whether the district court here properly exercised its express statutory jurisdiction under section 1007(a) of the regulatory act in considering Northeast's claim of violation of section 401(a) of the Act. This is not, then, a general primary jurisdiction case of accommodating judicial and administrative jurisdiction created under different, unrelated statutes; it is a peculiar case of jurisdiction by a court under a special jurisdictional provision of the particular regulatory statute. Therefore, the case has no important bearing upon questions of primary jurisdiction which arise under general jurisdictional statutes. For this reason alone, it is not one of general importance warranting the attention of this Court.

Moreover, section 1007(a) has been in the Federal Aviation Act and its predecessor, the Civil Aeronautics Act of 1938, for 27 years and in that time has been the subject of a mere trickle of litigation. The petition cites only one case other than the present which involved this statute —the 16-year-old case of *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F.2d 63 (9th Cir. 1949). The problem has arisen in few other cases, and it is clear that the narrow question of interpretation of section 1007(a) raised by the petition has not been a problem of moment.

In addition to involving a rarely-litigated special provision of the Federal Aviation Act, this case involved a confluence of circumstances peculiar to this litigation. First, the Board had, in its memorandum to the district court, expressly supported the exercise of jurisdiction by the court in this case and stated that any decision by the court here "would not affect or impair the exercise of

the Board's powers under the Federal Aviation Act." (R. 297). Second, the district court had the benefit of a decision by the Board's Bureau of Enforcement supporting the interpretation of petitioner's certificate on which Northeast's motion for summary judgment was premised—an interpretation which petitioner never contested administratively (R. 34-41); and finally, the issue on the merits involved the very narrow question of construction of the meaning of the word "engaged" in petitioner's certificate as it related to the legal effect of the so-called "Sales Agency Agreement"—a matter of documentary interpretation which was clearly a matter of law within the conventional experience and competence of courts.

Petitioner's claim of a conflict "in principal [sic]" between the decision below and the decision in the *Trans-Pacific* case, *supra*, is without substance. The courts in both cases recognized that certain problems require resort to agency expertise and others do not. The court in *Trans-Pacific* felt that the facts in that particular case did call for agency expertise; the court in this case felt that the facts here did not call for agency expertise. There is nothing in the *Trans-Pacific* opinion to indicate that the problem before the court there was at all comparable to the simple matter of documentary interpretation involved in this case. There is no real "conflict" between the two cases. The two courts simply reached different results on the facts before them as to whether administrative expertise was required.

II. In Any Event, the Decision Below Was Clearly Correct.

The decision below was clearly correct with respect to both the jurisdictional question and the merits. Section 1007(a) of the Act, 49 U.S.C. § 1487(a), provides that:

> "If any person violates any provision of this Act . . . or any term, condition, or limitation of any certificate . . . issued under this Act, the [Civil Aeronautics] Board . . . [its] duty authorized agents, or in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States . . . for the enforcement of such provision of this Act, or of such . . . term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process . . ."

Section 401(a) of the Act, 49 U.S.C. § 1371(a), provides that:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Northeast's claim in this case was that petitioner holds under section 401(a) of the Act a certificate as a supplemental air carrier which permits it to transport passengers only by "charter trips" which are defined by the certificate in very specific terms, and that petitioner, by performing flights engaged pursuant to the agreement with Nationwide, had flagrantly violated the terms of the charter-trip restriction of its certificate, thereby engaging in air transportation which was not authorized by such certificate.

The language of section 1007(a) clearly gives the district courts jurisdiction over such a claim and says nothing about resort to Board processes prior to exercise of jurisdiction by the court although section 1007(a) is part of the same statute which creates the Board and defines its jurisdiction. That such prior resort could not have been intended is manifest from section 1006(a) of the Act,

49 U.S.C. § 1486(a), which lodges exclusive jurisdiction over any appeal from Board proceedings in the Courts of Appeals. Thus, if resort to Board processes were required prior to the exercise of jurisdiction by the district court under section 1007(a), such jurisdiction—and the provision itself—would be nullified by the exclusive jurisdiction of a Court of Appeals over appeal from the Board proceeding.

That prior resort to the Board under section 1007(a) could not have been intended is also clear from the purpose of the provision. In supporting the exercise of jurisdiction by the district court in this case, the Board emphasized that "the very purpose of the Section 1007 provision permitting a private party to obtain an injunction against a violation of operating authority is to afford methods of enforcement *in addition to those provided by the Board* and in recognition of the fact that the Board's resources may not be adequate." [Emphasis added]. (R. 296).

Thus, if prior resort to Board proceedings were required under section 1007(a), a private party would have no *additional* remedy against a violation of operating authority but merely the same Board remedies made available elsewhere in the Act, thus nullifying any possible purpose of section 1007(a).

This very case is the prototype of that for which the Board's resources were wholly inadequate. The cumbersome, time-consuming enforcement procedures of the Board and its inability to give preliminary relief or money damages would certainly have enabled petitioner and Nationwide to effectuate their illegal scheme for the 1964-65 winter season to the substantial and irreparable injury of Northeast. In a case such as this, the Board's administrative procedure would be: Northeast would file a complaint; the Bureau of Enforcement would investigate the complaint and determine, in the exercise of discretion,

whether or not to institute enforcement proceedings; if none were instituted, Northeast could appeal successively to the Board and to an appellate court, as was done in *Northeast Airlines, Inc.* v. *Civil Aeronautics Board,* D. C. Cir. Dkt. No. 18,511; if enforcement proceedings were instituted, then after notice, a hearing and a Hearing Examiner's decision, the Board could for the first time order the cessation of the illegal activities. By that time, of course, the 1964-65 winter season would have been over, and Northeast could not have had any relief whatsoever against performance of an illegal contract which by its terms expired on May 4, 1965 (R. 388).

The courts and the Board have consistently recognized that the exercise by the courts of jurisdiction under section 1007(a) without prior resort to the Board does not, in the words of the Board in this case, "affect or impair the exercise of the Board's powers under the Federal Aviation Act." (R. 297). See *Civil Aeronautics Board* v. *Modern Air Transport, Inc.,* 179 F.2d 622 (2d Cir. 1950); *Pacific Northern Airlines* v. *Alaska Airlines,* 80 F. Supp. 592 (D. Alaska 1948); *Alaska Air Transport Co.* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. Alaska 1947); *Flying Tiger Line* v. *Atchison, T. & S. F. Ry Co.,* 75 F. Supp. 188 (D. Cal. 1947). There is no such impairment because "the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule." *Civil Aeronautics Board* v. *Modern Air Transport, Inc., supra* at 624, quoted in the decision of the First Circuit in this case at Pet. App. B-26. Thus, section 1007(a) properly leaves it to the Board to make the expert policy judgment as to the reasonableness of a certificate restriction but permits the courts to exercise their conventional function of determining violations of law by ascertaining the facts and measuring them against the terms of the legal restriction involved.

Such a task was particularly simple in this particular case, for the only fact before the court was the "Sales Agency Agreement" and the only issue was whether by such agreement Nationwide had "engaged" the capacity of petitioner's aircraft. The court had only to perform its conventional task of construing the agreement and measuring it against the clearly worded definition of "charter trip" in petitioner's certificate.

Petitioner's argument that the task of construing the contract required "specialized knowledge" of various specified matters is patently insubstantial and, indeed, is raised here for the first time. The record below is devoid of any evidence or argument regarding the legal significance of such empty jargon as "competing demands for jet capacity" or "'ferry' versus 'live' mileage". (Pet. 8). Even at this late stage petitioner simply states these hollow phrases without the slightest attempt to show what their legal significance might be.

Petitioner's further argument that a variety of circumstances showing "concern" by the Board with the definition of the term "charter trip" indicated that Northeast's claim was not within the competence of the court is manifestly specious. The matters set forth by petitioner as those with which the Board had been concerned, such as mass media advertising and the "Shower of Stars" case, which did not involve consideration of a "Sales Agency Agreement" such as was involved here, had nothing to do with the very narrow question of contract interpretation on which the decision of the court below was based. And the fact that the Board is considering the possible re-examination of the definition of "charter trips" in the certificates of the supplemental carriers is manifestly no basis for a court's refusing to exercise its clear jurisdiction under section 1007(a) to apply to facts before it the certificate provisions in effect at the time of suit. If the mere possibility of

amendment or modification of an air carrier's certificate by the Board—which is always present—were sufficient ground for ignoring the grant of jurisdiction in section 1007(a), the provision would be totally meaningless.

Furthermore, in this case there had been prior resort to the Board. The charges made by Northeast were set forth in detail before the Board's Bureau of Enforcement and that Bureau fully vindicated Northeast's position by the letter of December 11, 1964. Yet petitioner never took —as it might have[4]—a single step to contest further with the Board the Bureau's views. Petitioner was apparently more interested in arguing a theoretical primary jurisdiction in the courts than in obtaining a practical primary jurisdiction by the Board.

Thus the correctness of the court's decision rejecting applicability of primary jurisdiction to this case is supported by the language and purpose of section 1007(a), by the nature of the issue presented to the court for resolution, and by the fact that the views of the Board had been obtained and not contested by respondent.

On the merits also, the decision below was patently correct. The simple issue is whether the aircraft were "engaged" by Nationwide, a travel agent. If so, the agreement is illegal. The answer is equally simple. The aircraft were committed by petitioner to Nationwide for specific flights on specific days, and Nationwide was obligated to pay for each and every one of 218 non-cancellable flights at tariff rates less agency commission. Obviously, the aircraft were "engaged" by Nationwide.

This conclusion was supported by the Board's Bureau

[4] Petitioner might have sought from the Board a declaratory order that the agreement with Nationwide was legal or, alternatively, might have sought from the Board an exemption under section 416(b) of the Act, U.S.C. § 1386(b), covering flights under the agreement. For a case involving utilization of these procedures see *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 662 (1st Cir. 1965).

of Enforcement in its letter of December 11, 1964, in which the Bureau's director opined that

> "if express or implied guarantees as to . . . amounts of revenue are made by the agent . . . , it again appears that contrary to the strictures of . . . the interim certificates, . . . the agent is the true charterer." (R. 40).

Even petitioner advances no serious argument that the court's decision on the merits was erroneous. The most petitioner says is that the agency "might" have construed the contract differently. (Pet. 5).

III. The Underlying Dispute Is of No Continuing Significance.

The underlying dispute in this case — that over the legality of the World-Nationwide charter program — is of no continuing significance. The "Sales Agency Agreement" by its terms terminated May 4, 1965. (R. 388). It is highly unlikely that such a charter program will be renewed, regardless of the outcome of this litigation, in view of the fact that the Board has since adopted an order amending the interim certificates of petitioner and other supplemental air carriers to prohibit mass media advertising of charter trips, upon which such a charter program as that of World and Nationwide depends. (R. 414-422). This is the only pertinent amendment which the Board has made to petitioner's certificate since the present proceeding was initiated, and it is one which explicitly so restricts petitioner's charter authority as to eliminate as a practical matter any likelihood of a recurrence of this dispute over a charter program that expired by its own terms more than seven months ago. In these circumstances, the Board, if the matter were remitted to it, would certainly regard it

as moot and hypothetical, and review by this Court would, thus, serve no useful purpose related to this case.

Conclusion

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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